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No. 94-1326

In the

Supreme Court of the United States

October Term, 1994

CENTER FOR AUTO SAFETY,
Petitioner,

v.

JOHN T. WILLIS, in his capacity as
Secretary of State of Maryland,
Respondent.

On Petition For A Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Maryland's brief in opposition makes three points which warrant a response.

1. One theme that resonates throughout the State's opposition is that the Maryland statute does not discriminate against out-of-state charities, and hence does not violate the Commerce Clause. *E.g.*, Opposition Br. at 13 & n.6. We agree that the Maryland statute does not discriminate against non-Maryland charities *on its face*. But the Maryland statute plainly discriminates against out-of-state charities, and does so invidiously, because it fails to heed the constitutional imperative of fair apportionment—that is, ensuring that value earned outside a state is not subject to exaction.[1]

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[1]The Commerce Clause's requirement of "fair apportionment" is inextricably intertwined with its non-discrimination mandate. *See American Trucking Associations v. Schneider*, 483 U.S. 266, 291-92

(continued...)

Because it is unapportioned, Maryland's fee structure gives in-state charities a substantial advantage in competing for the limited dollars that Maryland residents have available for donating to charitable causes. An entirely local charity that solicits $24,500 from Maryland residents pays no fee, but a national charity that receives $100,001 in donations, of which $24.50 is obtained from Marylanders, must pay $200 for the right to solicit in the state. That is the essence of discrimination. And if other states follow Maryland's example in levying heavy charges on interstate solicitation (as they are doing, *see* Pet. at 7 n.1, *see also* Brief of *Amicus Curiae* Free Speech Coalition at 7 n.11), then charities will find it too expensive to seek out distant donors and will likely remain at home, soliciting only residents in states where they are incorporated or have their principal offices. The result would be precisely the kind of "economic Balkanization" that the Commerce Clause was designed to prevent. *See Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979); *see also Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272-73 (1984). Because the "inevitable effect" of unapportioned fees "is to threaten the free movement of commerce by placing a financial barrier around the State," they violate the Commerce Clause. *American Trucking*, 483 U.S. at 284.

2. The State's principal defense of Maryland's fee structure is that, because Maryland expends greater resources

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[1](...continued)
(1987). The reasons for, and importance of, fair apportionment flow from the fact that an unapportioned fee like Maryland's subjects petitioner's revenues to multiple taxation. *See J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311 (1938). (Commerce Clause forbids states from imposing multiple tax burden). Because this burden of multiple taxation would fall only on charities that solicit in more than one state, unapportioned fees are inherently discriminatory. They significantly increase the burden of solicitation on charities engaged in multi-state activities while effectively diminishing the costs of solicitation on charities that focus their efforts in one state.

in monitoring the activities of larger charities, it is therefore permissible for the State to charge larger charities higher fees. *See* Opposition Br. at 12-17. But this argument is beside the point, since it leaves entirely unaddressed whether it is permissible to charge large out-of-state charities the same fee as large in-state charities, without regard to whether the fee bears a reasonable "relationship to the taxpayers' presence or activities in a State." *American Trucking*, 483 U.S. at 291 (citation omitted). Yet settled Commerce Clause jurisprudence makes clear that a state may not impose a fee unless it is so tailored. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1978).

Maryland's only response to its failure to tailor its fees to charities' in-state presence or activities is to blame charities like petitioner for having "chosen not to solicit much business in Maryland," and to recite the Fourth Circuit's observation that "the Commerce Clause does not require that user fees be *precisely* correlated to the actual use that a party makes of government services." Opposition Br. at 14 (citing App. 8a) (emphasis added). The glaring flaw in this argument is that Maryland made no effort at all to base its fee on either the in-state activities of multi-state charities or the extent to which the charity "uses" Maryland's facilities (whatever they may be). Rather, Maryland's fee is based solely on the extent of a charity's nationwide activities, regardless of how much or little a charity actually solicits in Maryland. While the Fourth Circuit may be right that the Commerce Clause does not require exacting precision, it surely does not countenance total indifference to local presence or activity of the sort reflected in Maryland's fee system.[2]

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[2]In an effort to create the impression that petitioner's activities in Maryland are more extensive than they are, respondent claims that petitioner's solicitation activities in Maryland yield approximately $16,000 annually, instead of the $2,000 mentioned in the Petition. *Compare*

(continued...)

3. The most remarkable feature of the State's opposition brief is its failure to address head-on petitioner's argument that the fees imposed here are not "user fees." The State makes only a few brief points, none of which has merit.

Maryland string cites a number of cases for its assertion that a charge levied to defray the cost of regulation can properly be characterized as a user fee. Opposition Br. at 12-13. But none of those cases considered the *measure* of the fee or tax, *i.e.*, the method by which the tax was calculated. At most they addressed the prior, but abstract, question whether the state could impose any fee *at all* on firms engaged in interstate commerce. No question was raised in those cases as to whether the fee formula itself impermissibly burdened or discriminated against interstate commerce. Thus, in one case relied on by the State, *Duckworth v. Arkansas*, 314 U.S. 390 (1941), the validity of the fee was not even at issue, and the appellant's "sole contention [was] that the commerce clause precludes the state from exacting any form of permit, *either with or without a fee*," for interstate transportation. *Id.* at 394 n.1 (emphasis added). In another case cited by the State, *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1944), the Court upheld a flat $50 fee imposed on foreign business corporations, but there the appellant did not argue that the fee had to be apportioned to reflect its activities within the state.

Two other cases relied on by the State, *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939) and *Clyde Mallory Lines v.*

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[2](...continued)
Opposition Br. at 20 n.8 *with* Petition at 6-7. But most of petitioner's revenues are from its existing members, and under Maryland law, Md. Code Ann. art. 41, §3-203(3), charities that solicit only from their membership are exempt from the charitable solicitation law. Since 1989, petitioner's annual contributions from first-time Maryland contributors have never exceeded $2,000. Thus, it is uncontroverted that it costs petitioner $200 in fees to raise $2,000 or less.

Alabama ex rel. State Docks Commission, 296 U.S. 261 (1935), are distinguishable because they involved state policing of transportation facilities that the State owned and provided. Obviously, the State has the right to act as "traffic cop" on facilities it owns, operates, and rents out, to make sure that the use of these facilities is orderly and safe. These factual situations have no relevance to the case at bar, where there simply are no state-operated facilities used by petitioner.

Most surprising is the State's invocation of *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), which upheld Montana's severance tax on coal under the *Complete Auto Transit* test, but *not* on user fee grounds. In *Commonwealth Edison*, this Court held that Montana's tax was not a user fee, because that standard is applicable only when a state seeks to recoup the costs of operating a specific state facility, not when a state is raising money for the general support of its programs—as is the case here. Indeed, in *Commonwealth Edison*, the Court emphasized that the user fee doctrine is limited to fees "imposed by the State for the use of state-owned or state-provided transportation or other facilities and services" or "charges . . . purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services." *Id.* at 621-22. In this case, of course, it is manifest that Maryland's registration fee was not designed to compensate the state for services that it provides to the charities, but was intended to provide financial support for the state's policing and regulation of the charities.

The State's reference to the Charitable Giving Information Program, enacted at the time the Legislature created the sliding-scale fee system in 1989, brings this point into sharp focus. The State claims that "increased fees generated by the new fee scale were to be used to fund in part this new public service," and that "to ensure . . . increased service to the giving public," the legislation was amended to designate "one half of the amount of fees collected during the preceding fiscal year" to this program. Opposition Br. at 5.

This provision is proof-positive that the fee is nothing other than a tax imposed in significant measure to fund a state public education program; not a "user fee" in any sense that this Court has endorsed. And it underscores our fundamental concern—never addressed by the State—that there is no logical stopping point to its brazen user fee argument. If fees collected to engage in public information about charitable giving are properly characterized as user fees, then there is no limit to the user fee concept and no distinction between general taxes and user fees. The result will be that virtually every governmental service—ranging from public education to insurance regulation—would potentially be subject to user fees, calculated on the basis of the regulated entity's *nationwide* activities, and therefore open to exactions that impede and discriminate against interstate commerce.

CONCLUSION

For the reasons given above and in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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